

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

JULIA C. DUDLEY, CLERK
BY: *J. Moody*
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UNITED STATES OF AMERICA,)	Criminal Action No. 5:10CR00031
)	Civil Action No. 5:12CV80463
v.)	
)	<u>MEMORANDUM OPINION</u>
ADAN APARICIO-MARQUEZ,)	
)	By: Hon. Glen E. Conrad
Defendant.)	Chief United States District Judge

Adan Aparicio-Marquez ("Aparicio"), a federal inmate proceeding pro se, has moved to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. § 2255. Aparicio's motion asserts several claims of ineffective assistance, including a claim that his attorney was ineffective in failing to file a notice of appeal after Aparicio requested him to do so. The government filed a response to the motion on September 26, 2012. In the response, the government acknowledges that "a criminal defense attorney's failure to file a notice of appeal when requested by his client deprives the defendant of his Sixth Amendment right to the assistance of counsel." United States v. Peak, 992 F.2d 39, 42 (4th Cir. 1993); see also Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000). Because the resolution of this claim requires a credibility determination, or at least the receipt of evidence outside the present record, the government requests the court to order an evidentiary hearing on the issue of whether Aparicio requested his attorney to file a notice of appeal.

Upon review of the record, the court agrees with the government that the defendant's claim that his attorney was ineffective in failing to file an appeal cannot be resolved on the existing record, and that an evidentiary hearing is required. Accordingly, the case will be referred to the Honorable B. Waugh Crigler, United States Magistrate Judge for the Western District of Virginia, for an evidentiary hearing on the defendant's claim that counsel was ineffective in failing to file a notice

of appeal. The magistrate judge shall submit a report setting forth appropriate findings of fact, conclusions of law, and a recommended disposition of all of the defendant's claims, pursuant to 28 U.S.C. § 636(b)(1)(B).

The Clerk is directed to send a certified copy of this memorandum opinion and the accompanying order to the defendant, counsel of record for the government, and Judge Crigler.

ENTER: This 5th day of November, 2012.

Chief United States District Judge